DRAGGER ENGINEERING (M) SDN BHD v. EXORA TRADING & CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[CIVIL APPEAL NO: WA-12BNCVC-48-06-2020]
20 APRIL 2021

CIVIL PROCEDURE: *Trial – Appeal – Appellate intervention – Application to discharge extracted by counsel on date fixed for trial – Judge fixed another date to hear discharge of counsel but proceeded with trial – Party unrepresented – Whether judge erred in proceeding with trial – Whether party given adequate opportunity to take appropriate steps to defend itself at trial – Whether caused miscarriage of justice justifying appellate intervention*

The respondent filed a claim against the appellant for the alleged breach of a sub-contract between the respondent and the appellant. On 28 November 2017, the date fixed for trial at the Sessions Court, the then counsel for the appellant, informed the Sessions Court Judge ('SCJ') that he had applied to discharge himself from acting further for the appellant. The application to discharge was filed by counsel and was extracted on 28 November 2017. As the said application was only extracted on 28 November 2017, the SCJ decided not to hear the application and fixed the hearing of the application on 12 December 2017 to enable the then counsel to serve the said application of his client and file the requisite affidavit of service of the said application on the appellant. Despite adjourning the said application to discharge to 12 December 2017, the SCJ proceeded with the trial. After hearing the witnesses with no participation of the appellant's counsel and after submissions by the respondent's counsel, the SCJ granted the orders sought by the respondent. The appellant was not represented by counsel after 12 December 2017. Only the director of the appellant attended the Sessions Court on that date and filed written submissions as directed by the SCJ. Hence, this appeal, filed two years later after obtaining leave and extension of time from the Court of Appeal.

Held (allowing appeal with no order as to costs):

(1) Although, the appellant appeared in court on 12 December 2017, at that time, it was too late as the court had gone ahead with the trial. No reasonable judge facing the same facts would have continued with the trial without determining the application to discharge and without having the opportunity for the appellant to be informed of the said application to discharge and to appoint new lawyers or solicitors to represent itself at trial. Even if the director had attended court and filed its submission, to allow the proceedings to continue under such circumstances would be unfair and would cause a miscarriage of justice.

The appellant, being a company, is required to represent its case through a solicitor of its choice, in accordance with O. 5 r. 6 of the Rules of Court 2012. The SCJ had not provided adequate opportunity for the appellant to take the appropriate steps necessary to defend itself at the trial. The SCJ should have at least dismissed the application and under the circumstances, would have legitimately proceeded with the hearing of the trial on its merits. Thus, there was a serious miscarriage of justice justifying appellate intervention. (paras 18, 20 & 21)

(2) The filing of the appeal nearly two years from the date of the order of the Sessions Court was not fatal to the appellant's case. In fact, the Court of Appeal allowed the extension of time to file its appeal. (para 22)

Case(s) referred to:

Assunta Hospital v. Thanalakshmi Ayasamy Iyer & Ors [2019] 1 LNS 1442 HC ***(refd)***

Demag (M) Sdn Bhd v. Greenlinx Sdn Bhd [2012] 9 CLJ 49 CA ***(refd)***

Kotabato Corporation (M) Sdn Bhd & Anor v. Wisma Central Management Corporation [2003] 4 CLJ 520 CA ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd [2016] 4 CLJ 665 CA ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd [2017] 5 CLJ 58 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 5 r. 6

For the appellant - Muhammad Zahir Sanjay Abdullah; M/s Muhammad Zahir
For the respondent - Hussin Mohd Razak; M/s Mohd Irwan Mohd Mubarak

Reported by S Barathi

JUDGMENT

Indera Mohd Arief Emran JC:

[1] This is the appeal against the judgment of the learned Sessions Court Judge entered on 3 January 2018.

Background Facts

[2] The respondent had filed a claim against the appellant for the sum of RM437,729.32 for the alleged breach of the sub-contract between the respondent and the appellant.

[3] The respondent alleges, *inter alia*, that the appellant, despite being paid the sums of RM437,729.32, failed to complete the sub-contract and had therefore committed a breach of the same. Therefore, the respondent claims that said sums should be repaid to it by the appellant.

[4] The respondent also claims liquidated damages to the sum of RM48,000 and interest at 5% on daily rest on the above sums from the date of filing of the statement of claim to the date of full realisation of the sums claimed.

[5] The defendant denies that there was any breach of sub-contract and allege that the termination was made undertaken in bad faith.

[6] The respondent filed its claim before the Sessions Court and was fixed for trial on 28 November 2017.

Events On 28 November 2017

[7] Both counsels for the appellant and the respondent appeared before the learned Sessions Court Judge.

[8] Due to reasons not disclosed to this court, the then counsel for the appellant, informed the learned Sessions Court Judge that he had applied to discharge himself from acting further for the appellant. The application to discharge was filed by the aforesaid counsel and was only extracted on 28 November 2017.

[9] The aforesaid counsel for the appellant then sought to have the application heard to enable him to not act further on behalf of the appellant. As the said application was only extracted on 28 November 2017, the learned Sessions Court Judge decided not to hear the said application. Any application to discharge by an advocate and solicitor had to be served on their former clients to ensure that they are informed of the decision to discharge and to enable parties to appoint alternative solicitors or counsel of their own choice.

[10] The learned Sessions Court Judge then fixed the hearing of the aforesaid application to discharge on 12 December 2017 to enable the then counsel to serve the said application on his client and file the requisite affidavit of service of the aforesaid application on the appellant.

[11] Despite adjourning the said application to discharge to 12 December 2017, the learned Sessions Court Judge proceeded with the trial. Witnesses were called to give evidence on behalf of the respondent, with no participation from the appellant's counsel. Although it is not clear from the notes of evidence whether the appellant's then counsel left the court. However, this appears at para. 4 of the grounds of judgment of the learned Sessions Court Judge. After hearing the witnesses with no participation of the appellant's counsel and after submissions by the respondent's counsel, the learned Sessions Court Judge granted the orders sought by the respondent as seen in the order dated 3 January 2018.

[12] This court is informed by counsels of both the appellant and the respondent that the director of the appellant had attended the Sessions Court on 12 December 2017 and filed written submissions as directed by the

learned Sessions Court Judge. The appellant was unfortunately not represented by counsel after 12 December 2017 and had been represented by a director of the company. These facts did not appear in the record of appeal but were agreed to by both counsels for the appellant and the respondent during the hearing of this appeal.

[13] The appellant only filed its appeal against the decision of the learned Sessions Court Judge on 24 June 2020 after obtaining leave and extension of time from the Court of Appeal on 23 June 2020.

Whether This Court Should Interfere With The Decision Of The Sessions Court

[14] I am guided by the principles of law as laid down in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, *MMC Oil & Gas Engineering Sdn Bhd v. Tan Bock Kwee & Sons Sdn Bhd* [2016] 4 CLJ 665, *Nor Azlina Abdul Aziz v. Expert Project Management Sdn Bhd* [2017] 5 CLJ 58 and by the Federal Court in *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1.

[15] It is sufficient that I reproduce the judgment of Nallini Pathmanathan JCA (as Her Ladyship then was) in *MMC Oil & Gas Engineering Sdn Bhd* (*supra*):

> [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. *The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference merely on the grounds that the appellate court forms a different opinion on the same evidence.*
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> [18] Judicial decisions are required to be handed down expeditiously and with minimum delay. However, this ought not to compromise the fundamental requirement that trial judges undertake a comprehensive and holistic approach to the evaluation of evidence in reaching their findings at first instance. A failure to consider the entirety of the evidence and material issues, a failure to make findings of fact or the making of bare findings of fact, all allow for appellate intervention. *Apart from the real possibility of a miscarriage of justice, such omissions by a trial judge require the appellate courts to take on the role of first instance judges and review the evidence in its entirety afresh. This in turn amounts to a strain on judicial resources. The importance of a comprehensive consideration of the matter at first instance cannot be sufficiently emphasised. Equally when there has been just such a holistic approach adopted, there should be considerable appellate restraint exercised when reviewing a first instance judgment on appeal.*

[16] I have considered the judgment of the Court of Appeal in *Demag (M) Sdn Bhd v. Greenlinx Sdn Bhd* [2012] 9 CLJ 49, where Anantham Kasinather JCA stated:

> [11] Generally the position in Malaysia is similar to that in the United Kingdom in that a court of law when considering an application to set aside a default judgment after trial should have regard to the following factors:
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> > (1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision. (2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important; unless the absence was not deliberate but was due to accident or mistake, the Court will be unlikely to allow a rehearing. (3) Where the setting aside would entail a complete retrial on matters of fact which have already been investigated by the Court the application will not be granted unless there are strong reasons for doing so. (4) The Court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success. (5) Delaying in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it. (6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered; where he has failed to comply with orders of the Court, the Court will be less ready to exercise its discretion his favour. (7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences. (8) There is a public interest in there being an end to litigation and in not having the time of the Court occupied by two trials, particularly if neither is short.
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> (see Leggatt LJ at p. 381 of the reported judgment of the court in *Shcked & Anor v. Goldschimdt & Ors*).
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> [13] We accept the current state of the law on this subject to be that contained in the majority decision of this court in *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors*. In other words, the mistake of the legal representative of the appellant cannot constitute a valid excuse for the appellant's absence in court. However, in our judgment, there is one significant fact which distinguishes the facts of this case from the cases of *Shcked & Anor v. Goldschimdt & Ors* and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors*. That is this. In this case, unlike the cases of *Shcked & Anor v. Goldschimdt & Ors* and *Lembaga Kemajuan Tanah Persekutuan (Felda) & Anor v. Awang Soh Mamat & Ors*, counsel for the appellant was present in court when the appellant's claim was called for trial. In other words, a legally-recognised agent of the appellant in the form of its former solicitor was present to safeguard its interest at the commencement of the trial.

Accordingly, in our judgment, this is not a case where only one party was present when the appellant's claim was called for trial so as to enable the court to proceed under O. 35 r. 1(2).

The state of affairs whereby only one party was present during the trial came about as a result of the learned trial judge's decision to first entertain the oral application by the appellant's former solicitors to discharge themselves and more importantly to then allow the application.

[14] In our judgment, if the learned trial judge was proposing to proceed with the trial, with respect, Her Ladyship should have either dismissed the application for discharge or alternatively if Her Ladyship was inclined to allow the application, then, at the very least, adjourned the trial of the claim and the counterclaim to the following day bearing in mind that the trial was fixed for hearing over three days. Furthermore, it should have occurred to Her Ladyship that this was the most prudent thing to do since the appellant was a locally incorporated Company operating in the city. Such an adjournment conditional on the former solicitors notifying the appellant of the new date of trial would have enabled Her Ladyship to ascertain why the appellant was absent and secondly, ascertain the appellant's intention as regards the claim and the counterclaim. In our judgment, quite apart from the validity of the reasons for the appellant's absence on the morning of the trial, there is the issue of O. 64 r. 5(1) of the RHC. According to this rule, the appellant's solicitors continued to be the solicitors for the appellant unless and until they were served with a copy of the order. In other words, O. 64 r. 5(1) read with O. 35 r. 1(2) of the RHC implies that the former solicitors of the appellant continued to be solicitor for the appellant, notwithstanding, the order of the learned trial judge allowing their oral application for discharge. For this reason, the appellant was entitled to assume that it was legally represented throughout the trial when this was clearly not the case. *There is no evidence that the appellants were served at all with the order of discharge. In our judgment, the judge's action in proceeding with the trial without regard to the protection afforded to the appellant by O. 64 r. 5(1) of the RHC amounted to a serious miscarriage of justice and a ground in itself to reinstate the appellant's claim and set aside the judgment of the court of 12 May 2009 allowing the respondent's counterclaim.*

Also refer to the decision of Tun Abd Majid Dato Haji Tun Hamzah JC (as he then was) in *Assunta Hospital v. Thanalakshmi Ayasamy Iyer & Ors* [2019] 1 LNS 1442.

[17] This position was persuasively argued by counsel for the appellant who suggests that the failure of the learned trial judge to adjourn the proceedings and have the application for discharge heard on another date tantamount to a serious miscarriage of justice. The respondent's counsel also valiantly argued that because the appellant's director did attend court on 12 December 2017 and filed submissions as director, this would not have constituted any miscarriage of justice. However, for reasons stated below, I agree with the arguments raised by the appellant.

[18] The facts as disclosed in the record of appeal and the grounds of the learned judge indicate that the learned Sessions Court Judge did commit such an error that justifies appellate intervention. I find that no reasonable judge facing the same facts would have continued with the trial without determining the application to discharge and without having the opportunity for the appellant to be informed of the said application to discharge and to appoint new lawyers or solicitors to represent itself at trial. As it stood on the date of the trial, the appellant would be entitled to assume that it was represented by its previous counsel and should have had the opportunity to canvass its defence through witnesses as well as through cross-examination of the respondent's witnesses. The appellant being a company, is required to represent its case through a solicitor of its choice in accordance to O. 5 r. 6 of the Rules of Court 2012 and *Kotabato Corporation (M) Sdn Bhd & Anor v. Wisma Central Management Corporation* [2003] 4 CLJ 520; [2003] 4 MLJ 473.

[19] As stated earlier, I am guided and bound by the decision of the Court of Appeal in *Demag (M) Sdn Bhd v. Greenlinx Sdn Bhd* [2012] 9 CLJ 49.

[20] Although the appellant did appear in court on 12 December 2017, at that time it would have been too late. The court had gone ahead with the trial and it would have left the appellant at a substantial disadvantage. The appellant could not put any further evidence and had not been afforded the opportunity to put its case through its counsel to the respondent's witnesses. Therefore, even if the director had attended court on 12 December 2017 and filed its submission, to allow the proceedings to continue under such circumstances would have been unfair and would have caused a miscarriage of justice. The Sessions Court Judge should have not proceeded with the trial if the application of discharge was not heard. The appellant would have therefore been entitled to assume that it was represented by counsel on the date of the trial and would have been afforded adequate opportunity to put its case forward for consideration.

[21] It is therefore my finding that the learned Sessions Court Judge had not provided adequate opportunity for the appellant to take the appropriate steps necessary to defend itself at trial. The learned Sessions Court Judge should have at least dismissed the application and under those circumstances could have legitimately proceeded with the hearing of the trial on its merits. Thus, I am of the opinion that the facts disclose a serious miscarriage of justice justifying appellate intervention. I am empowered under those circumstances to set aside the order of the Sessions Court and order that a new trial be fixed before the Sessions Court.

[22] I note that the appellant only filed its appeal nearly two years from the date of the order of the Sessions Court, but this issue is not fatal to the appellant's case as the Court of Appeal did allow the extension of time to file its appeal. Therefore, as I am bound by the decision of the Court of Appeal, I hereby rule that the aforesaid delay is not fatal and based on the overriding miscarriage of justice as highlighted earlier.

[23] I further note that the appellant has raised other issues as part of its memorandum of appeal. However, as I am allowing the appeal based on the point raised in the earlier paragraphs, these other issues need not be dealt by me in this proceeding. Parties should canvass the claim and the defence fully before the Sessions Court by way of a new trial.

Decision

[24] Therefore, given the above, I hereby allow the appeal with no order as to costs. Parties are to appear before the Sessions Court Judge to fix new trial dates and can canvass all issues based on the pleadings before the aforesaid court.